IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 199 of 1996
with
SPECIAL CRIMINAL APPLICATION NO. 265 OF 1996
with
SPECIAL CRIMINAL APPLICATION NO. 266 OF 1996
with
SPECIAL CRIMINAL APPLICATION NO. 267 OF 1996
AND
SPECIAL CRIMINAL APPLICATION NO. 268 OF 1996

MRS SAFIA MUSTAFA MEMON & ORS.
versus
STATE OF GUJARAT

For Approval and Signature:

Hon'ble MR.JUSTICE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? - Yes

2. To be referred to the Reporter or not? - Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? - No

4. Whether

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of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? - No

5. Whether it is to be circulated to the Civil Judge? - No

Appearance:
M/S MG DOSHIT & CO for Petitioners
MR.S.R.DIVETIA, ADDL.PUBLIC PROSECUTOR for Respondent State

CORAM : MR.JUSTICE S.D.DAVE
Date of decision: 1st May 1996

COMMON ORAL JUDGEMENT

Present orders shall govern the decision and disposal of these five petitions which present a common question. I feel that, I am concerned to a great extent, with the principles of Judicial Discipline, Judicial Comity and Judicial Concomitance.

The provision of law which requires to be kept in view would be, Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (`TADA Act, 1987' for short), which runs thus:

"19. Appeal. - (1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.

(2) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Designated Court.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days."

My endeavour should be to put the facts in a compass which would be less disputable. The narration, of course, would be a broad one, necessarily, only for the purpose of highlighting the background in which, the present proceedings arise.

A motor truck bearing registration No. GQF-7644 came to be intercepted somewhere near Bharuch and a huge quantity of Gold of the value of Rs.5,11,00,000/- came to be recovered from the said vehicle. It appears that, this interception and the seizure was, as a result of

some information supplied to the appropriate Department by one Mohammed Siddiq. He, therefore, according to the Department, was entitled to a reward in vicinity of Rs.70 lakhs. The above said award amount came to be paid to Mohammed Siddiq in three instalments. It appears that, after the receipt of the two instalments, an amount of Rs.11 lakhs came to be paid to one Ikram who is said to be a co-informant. Any how, it appears that, later on, the entire amount of Rs.70 lakhs came to be deposited at Development Co-operative Bank, Bombay. Later on, various cheques came to be given to certain persons who are the petitioners before me. It is interesting to note that, Mohammed Siddiq, who had parted with the money which was lying in his Bank Account had filed the FIR at Mangrol Police Station, which came to be registered as CR No.I-38 of 1994 for the alleged commission of various offences punishable under Sections 342, 365, 395 and 397 read with Section 120-B of IPC and under Sections 3 and 5 of the TADA Act, 1987. The above said proceedings are pending before the learned Sessions-cum-Designated Judge, Junagadh. There was a prayer coming from the prosecuting agency that, the Accounts of the petitioners should be seized and frozen. This came to be done, vide orders dated September 12, 1994. The Account holders came to know of this because the Bank had intimated them by separate communications. The petitioners had presented the necessary applications for raising the above said orders. Along with the same, the State had made the necessary application at Exh.19 for having the orders of recovery of the entire money as the muddamal, in the above said case. All these applications came to be decided by the learned Judge of the Designated Court, Junagadh vide orders dated December 29, 1995. The applications at Exhs.4, 6, 8, 10 and 12 filed the respective Account holders came to be rejected. The Development Co-operative Bank, Mohammed Ali Road Branch, Bombay, came to be directed to hand over the entire balance in three savings Accounts with them to the Investigating Officer for seizure as the muddamal money in CR No.I-38 of 1994 registered at Mangrol Police Station. The Memon Co-operative Bank, Morland Road Branch, Bombay came to be directed to hand over the entire balance amount in seven savings Accounts with them to the Investigating Officer for seizure as the muddamal. In the same way, the Mercantile Co-operative Bank, Saboo-Siddiq Mustafir Khana, Palton Road Branch, Bombay also came to be directed to hand over the entire balance in a savings Bank Account with them to the Investigating Officer for seizure as the muddamal money in the above said offence. These orders dated December 29, 1995 are sought to be challenged in the present proceedings before

me.

Section 19 of the TADA Act 1987, which has been reproduced above, makes it abundantly clear that, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law. It is also clear that no appeal or revision shall lie to any Court from any judgment, sentence or order, including the interlocutory order of a Designated Court, except as stated in sub-section (1) of Section 19 of the TADA Act 1987. Learned Government Counsel Mr.Divetia, placing heavy reliance upon these provisions, urges that, if the orders in challenge are to be characterised as interlocutory orders, then of course, no proceedings would lie before me. Arguing in the same line, learned Government Counsel urges that, if the above said orders are to be characterised as judgment or the orders, which cannot be said to be interlocutory orders in nature, the appropriate and the necessary forum would the Supreme Court of India. The contention appears to be based upon a bare reading of Section 19 of the TADA Act, 1987. No other view appears to be permissible excepting the above said proposition coming from learned Government Counsel Mr.Divetia. In rather a different fact-situation, the Supreme Court had the occasion to have a look at the above said provisions with which I am concerned, at present. In BONKYA ALIAS BHARAT SHIVAJI MANE AND ORS., APPELLANT vs. STATE OF MAHARASHTRA, RESPONDENT, (1995) 6 SCC P.447, the Supreme Court has made it abundantly clear that, on a bare perusal of the provisions contained under Section 19 of the TADA Act, it appears that an appeal against the judgment, sentence or order of the Designated Court (excepting interlocutory order) shall lie on facts and on law, to the Supreme Court and that, no appeal or revision shall lie to any other Court. These observations of the Supreme Court, upon a perusal of the provisions contained under Section 19 of the TADA Act, 1987 would make it abundantly clear that, the learned Government Counsel is perfectly justified on the question of the interpretation of the above said provisions.

It requires to be appreciated that, Mr.M.G. Doshit, learned Counsel who appears on behalf of the petitioners would like to characterise the above said orders in challenge as interlocutory orders. The contention coming from the learned Counsel is that, the interlocutory orders, though made and said to be final under the provisions contained under Section 19 of the TADA Act, 1987, would be amenable to my writ jurisdiction

while exercising the powers under Articles 226 and 227 of the Constitution. The learned Counsel urges with great vehemence that, untrammelled powers of this Court under the above said two Articles would permit me to examine the question regarding the legality and validity of the said orders which have been brought in challenge before me. As indicated by me at the initial juncture, I throughout feel that that, I am concerned with the question regarding the judicial discipline, judicial comity, and judicial concomitance. I say so because, many a times when the orders of a particular court or a judicial tribunal are made or said to be final in nature against which, no proceedings would lie, they are at times taken as amenable to the writ jurisdiction of the High Court which would be acting under Articles 226 and 227 of the Constitution, but this general principle does not appear to be attracting here, regard being had to the provisions contained in Section 19 of the TADA Act, 1987. The whole scheme of the Act, when examined closely, would make it clear that the powers have been invested in the Designated Court and that the party aggrieved is required to approach the Supreme Court. In other words, the intermittent judicial step of the High Court has been taken away. This appears to have been done with a great purpose because, the Legislature wanted to curb the terrorist and disruptive activities which were found to be on a rise at the relevant time, in the country. Therefore, when the question comes regarding such powers being amenable to the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution, the purpose and the scheme of the TADA Act, 1987 shall have to be kept in mind.

The Supreme Court decision in the case of KARTAR SINGH, PETITIONER vs. STATE OF PUNJAB, RESPONDENT, (1994) 4 SCC P.569 appears to be a guiding pronouncement. Both the views, namely, the majority and the minority one, would go to suggest that, even if certain orders under the TADA Act, 1987 could be said to be amenable to the writ jurisdiction of the High Court, acting under Articles 226 and 227 of the Constitution, then also, the High Courts shall have to be on their guard and such powers shall have to be exercised in rare cases only. The emphasis is being placed upon the principles of judicial discipline, judicial comity and judicial concomitance. The majority and the minority views, though worded differently, the principle enunciated appears rather, one and the same. The Supreme Court in KARTAR SINGH (supra) was concerned with the powers and the jurisdiction of the High Courts to grant bail while acting under Articles 226 and 227 of the Constitution.

The Supreme Court has read the relevant provisions of the TADA Act, 1987 along with Section 20(7) of the Act. Upon doing so, following are the observations of the Supreme Court:

> "Though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. The legislative history and the object of TADA Act indicate that the special Act has been enacted to meet challenges arising out of terrorism and disruption. Special provisions are enacted in the Act with regard to the grant of bail and appeals arising from any judgment, sentence or order (not being an interlocutory order) of a Designated Court etc. The overriding effect of the provisions of the Act (i.e. Section 25 of TADA Act) and the Rules made thereunder and the non-obstante clause in Section 20(7) reading, "Notwithstanding anything contained in the Code...." clearly postulate that in granting of bail, the special provisions alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of an appeal. If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated. But at the same time it cannot be said that the High Courts have no jurisdiction. Therefore, we totally agree with the view taken by this Court in Abdul Hamid Haji Mohammed that if the High Court is inclined to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in straight-jacket. However, we would like to emphasise and re-emphasise that the judicial discipline and comity of courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the special Act since this Court has jurisdiction to

interfere and correct the orders of the High Courts under Article 136 of the Constitution."

The said observations would go to show that the Supreme Court, by the majority view, has agreed with the earlier view of the Supreme Court that, if the High Court is inclined to entertain any application under Articles 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. The Supreme Court has, of course, said that, those rare cases which would justify the entertaining of applications under Article 226 can never be put in a straight-jacket. After having said so, the pronouncement proceeds to say that, they would like to emphasise and re-emphasise that, the judicial discipline and the comity of the Courts require that, the High Court should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the special Act since the Supreme Court has got the jurisdiction to interfere and correct the orders of the High Court under Article 136 of the Constitution. Thus, there could not a quarrel regard being had to the above said observations of the Supreme Court that, if the High Court is inclined to exercise the powers vested in it, under Article 226 of the Constitution, the exercise must be most sparing and that also should be done in rare and appropriate cases in extreme circumstances.

The minority view also appears to be laying down more or less the same principle. The relevant portion of the paragraph 427 on page 747 reads thus:

"The jurisdiction and power of the High Court under Article 226 of the Constitution is undoubtedly constituent power and the High Court has untrammelled powers and jurisdiction to issue any writ or order or direction to any person or authority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest the court of the constituent power engrafted under Article 226. A superior court is deemed to have general jurisdiction and the law presumes that the court has acted within its jurisdiction. The presumption is denied to the inferior courts. The judgment of a superior court unreservedly is conclusive as to all relevant matters thereby decided, while the judgment of the inferior court involving a question of jurisdiction is not final. The

superior court, therefore, has jurisdiction to determine its own jurisdiction, may be rightly or wrongly. Therefore, the court in an appropriate proceeding may erroneously exercise jurisdiction. It does not constitute want of jurisdiction, but it impinges upon its propriety in the exercise of the jurisdiction."

These observations would go to show that the jurisdiction and power of the High Court under Article 226 of the Constitution is undoubtedly constitutional power and the High Court has untrammelled powers and jurisdiction to issue any writ or order or direction to any person or authority within its territorial jurisdiction. It is also said that the superior court has to determine its own jurisdiction also.

At paragraph 428, the minority view proceeds to say that, the decision or order or a writ issued by the High Court under Article 226 is subject to judicial review by a appeal to the Supreme Court under Article 136 whose sweep is wide and untrammelled. It is also said that the jurisdiction of the High Court though was not expressly excluded under the Act, by necessary implication it gets eclipsed not so much that it lacked constituent power, but by doctrine of concomitance. The following observations of the Supreme Court occurring at paragraph 435 (page 751) appear to be more clear in guiding me:

"Judicial pragmatism, therefore, poignantly point, per force to observe constitutional propriety and comity imposing self-discipline to decline to entertain proceedings under Article 226 over the matters covered under Section 19 or the matters in respect of which remedy under Section 19 is available or taken cognizance; issue of process or prima facie case in the complaint or charge-sheet etc., in other words all matters covered under the Act. Thus the High Court's jurisdiction got eclipsed and denuded of the powers over the matters covered under the Act."

I am also concerned with Section 19 of the TADA Act, 1987. The above said observations say that, judicial pragmatism point per force to observe constitutional propriety and comity imposing self-discipline to decline to entertain proceedings under Article 226 of the Constitution over the matters covered under Section 19 of the TADA Act, 1987. It is clear from

these observations that, the jurisdiction of the High Court gets eclipsed and denuded of the powers over the matters covered under the Act. These are the observations of the Supreme Court while examining the question of the powers of the High Court under Article 226 of the Constitution read along with the provisions contained under Section 19 of the TADA Act, 1987.

Mr.Doshit, learned Counsel, who appears on behalf of the petitioners urges that the present petitioners are not the accused persons and that no case or offence against them has been registered under TADA Act, 1987. The learned Counsel points out with clarity and vehemence that the question before me is in respect of certain monies lying in the Bank Accounts of the petitioners and much would depend upon the answer to the question as to whether the above said monies could be said to be muddamal money. The endeavour on the part of the learned Counsel is to emphasise that, ultimately, I am concerned with the question of the character and nature of the monies lying in the Accounts of the petitioners and not with any of the offences which could have been said to be committed under the TADA Act, 1987. Nonetheless, it requires to be appreciated that the orders are passed by the Designated Court and certain proceedings are pending under the TADA Act, 1987. The whole question has bearing with certain offences allegedly committed by some people which would allegedly fall within the purview of the TADA Act, 1987. Regard being had to the clear language employed by the Legislature while drafting the provisions contained under Section 19 of the TADA Act, 1087 and the above said principles enunciated by the Supreme Court emphasising upon the principle of judicial discipline, judicial comity and judicial concomitance, I am of the opinion that, I should refrain from exercising my jurisdiction and power under Articles 226 and 227 of the Constitution of India.

Thus, it appears that, the preliminary contention coming from learned Government Counsel Mr.Divetia requires a recognition and the present proceedings shall have to be disposed of accordingly. The proceedings are at the stage of notice and they shall stand rejected, on the principles indicated by me above, namely, the principle of judicial discipline, judicial comity and judicial concomitance, upon which I am of the opinion that, I should refrain from exercising my jurisdiction and powers under Article 226 of the Constitution of India. The proceedings stand disposed of accordingly. The notice shall stand discharged. The certified copies of the present orders shall be made available to the

learned Counsels for the respective parties by the Registry as early as possible.

Upon a request coming from learned Counsel Mr.Doshit, I prefer to say that the parties shall maintain the status-quo regarding the Accounts and the amounts lying therein, as on today, for a period of four weeks hereof, so that the petitioners can approach the appropriate forum and can obtain the suitable orders. The necessary yadis be sent to the concerned Banks by the Registry forthwith.

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